

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION**  
**OF SOUTH CAROLINA**  
**DOCKET No. 2017-381-A**

In Re: The Impact of the Tax Cuts and Jobs Act On South Carolina Utilities	) KIAWAH ISLAND UTILITY, INC.'s ) RESPONSE TO ORS's MOTION ) TO PRESERVE TAX BENEFITS ) FOR RATEPAYERS
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Kiawah Island Utility, Inc. ("KIU") hereby responds to the motion filed by the Office of Regulatory Staff ("ORS") on April 6, 2018, in which it requests an order from this Commission directing utilities to reduce rates and issue refunds to their customers in an amount corresponding to what the ORS calls the "benefits" of the Tax Cuts and Jobs Act ("TCJA"). ORS does not define the TCJA's benefits in its motion or the underlying petition. However, ORS's position in a recent rate case indicates the agency is seeking a reduction in rates and a refund of revenues collected equivalent to the utility's reduction in income tax expense, regardless of whether the utility has an opportunity to earn its authorized rate of return or operating margin.<sup>1</sup>

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<sup>1</sup> See Rev. Prefiled Surrebuttal Testimony of Matthew P. Schellinger, II, pp. 10, line 4- 11, line 8, Docket 2017-292-WS, Application of Carolina Water Service, Inc. (*stating in part*: "ORS calculated an estimate of the revenue amount billed to CWS customers which can be attributed to the changed in federal income tax rate from 35% to 21%. ORS's calculation accumulates in a deferred account the portion of the Company's revenue representing the difference between the cost of service approved by the Commission in the Company's most recent rate case (Docket No. 2015-199-WS) and the cost of service that would have resulted had the provision for federal income taxes been based on 21% rather than 35%. ORS's calculation utilizes the period from January 1, 2018, through the effective date of new rates based on S.C. Code Ann. Laws § 58-5-240(C) which is May 10, 2018. ....ORS recommends this amount be placed into a regulatory liability and amortized over three (3) years to coincide with the timing related to the proposed amortization schedules for both rate case expenses and unprotected Accumulated Deferred Income Tax ("ADIT").")

KIU does not oppose tracking the effects of the TCJA until a hearing can be held. However, KIU does oppose the assignment of funds to a deferral account so they are earmarked for a future refund without consideration of the company's overall financial position. Therefore, KIU opposes the ORS's motion because, it is procedurally improper, without statutory basis, and it requests the Commission take action inconsistent with established ratemaking principles, violate due process of law, and engage in impermissible retroactive ratemaking.

**1. The Commission must open a contested docket before considering the ORS's motion.**

The ORS's motion is procedurally inappropriate. In response to the ORS's petition, which requested that the Commission require reports from regulated utilities on the TCJA and order rates collected on January 1, 2018 and thereafter be subject to refund, the Commission opened this docket. The Commission ruled that reports would be required, and requested comments from affected utilities as to the "timing and format" of the reports by January 24, 2018. Order 2018-26. The Commission also noted: "If necessary, a procedural schedule will be set following the submission of reports by the utilities." *Id.* The Commission declined to rule that rates in effect as of January 1, 2018, be collected subject to refund.

KIU moved to intervene in this docket on January 5, 2018, and Daufuskie Island Utility Company, Inc. moved to intervene on January 18, 2018. However, the Commission did not grant intervention. The Commission ruled:

Defer petition to intervene until Commission has analyzed responses and received ORS's recommendation for further process consistent with their Petition. It is uncertain if the outcome will be a contested proceeding. The Commission will of course provide opportunity to be heard consistent with due process.

Orders 2018-275 and 2018-276, Docket 2017-381-A.

KIU committed to provide the requested information about the effects of the TCJA. *See* Comments of KIU filed Jan. 24, 2018, p. 1.

The Commission has treated this docket much in the manner as a workshop, or a request for public comments in a rulemaking.<sup>2</sup> The Commission's reluctance to open a contested docket was understandable. The effects of the TCJA were —and are —still being determined by the regulated utilities, and the appropriateness of the relief sought by the ORS was likewise unclear. Notwithstanding the Commission's decision not to open a contested docket, the ORS has now moved for immediate rate reductions by those regulated utilities in the docket that disagree with its position. The ORS's motion cannot be considered, let alone granted, without proper notice and an opportunity to be heard. Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 109 (2011). The Commission must declare the docket contested, provide notice, set a deadline for intervention, briefing, and hold a hearing, before even considering the merits of the ORS's motion.

## **2. There is no statutory basis for the refunds sought by the ORS.**

The ORS cites S.C. Code Section 58-27-870(F) as the basis for its motion; this section says:

Notwithstanding the provisions of Sections 58-27-860 and 58-27-870, the commission may allow rates or tariffs to be put into effect without notice and hearing upon order of the commission when such rates or tariffs do not require a determination of the entire rate structure and overall rate of return, or when the rates or tariffs do not result in any rate increase to the electrical utility, or when the rates or tariffs are for experimental purposes, or when the rates or tariffs so filed are otherwise necessary to obtain an orderly rate administration.

The corresponding statute applicable to water and sewer utilities is S.C. Code § 58-5-240(G), but neither statute is applicable to the present circumstances. The ORS has not proposed tariffs or rates for the Commission to “*allow to be put into effect*” a requisite component of the statutes. Instead, the ORS has requested the Commission *order* utilities to file revised tariffs, relief not

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<sup>2</sup> KIU notes the vast majority of the utilities on the service list for this docket are not represented by counsel, which may change if the docket becomes contested.

provided for by Section 58-27-870(F) or 58-5-240(G). Furthermore, the revised tariffs requested by the ORS would necessarily affect a utility's rate of return (or operating margin, in KIU's case), making Sections 58-27-870(F) and 58-5-240(G) inapplicable. When a utility's rate of return will be affected by proposed rates, S.C. Code §§ 58-27-870(G) and 58-5-240(H) require "The commission's determination of a fair rate of return must be documented fully in its findings of fact and based exclusively on reliable, probative, and substantial evidence on the whole record." There is no way for the Commission to grant the relief requested – a sizeable reduction in revenues -- *without* a determination of the utility's rate structure and overall rate of return or operating margin.

The only appropriate statutory basis for a request to revisit a water and wastewater utility's rates under the present circumstances is S.C. Code § 58-5-290 which provides:

Whenever the Commission shall find, *after hearing*, that the rates, fares, tolls, rentals, charges or classifications or any of them, however or whensoever they shall have theretofore been fixed or established, demanded, observed, charged or collected by any public utility for any service, product or commodity, or that the rules, regulations or practices, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any wise in violation of any provision of law, the Commission shall, subject to review by the courts, as herein provided, determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to be thereafter observed and enforced and shall fix them by order as herein provided.

S.C. Code § 58-5-290 (*emphasis added*).<sup>3</sup>

Consistent with Section 58-5-290, KIU has always maintained the effects of the TCJA cannot be viewed in isolation. In response to the Commission's request for comments, KIU stated: "Any refund or credit that may be ordered as a result of the report [estimating the impact of TCJA]

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<sup>3</sup> See Porter v. S.C. PSC, 328 S.C. 222, 235 (1997) ("under this statute, the Commission has the continuing power to prospectively correct or reduce a previously approved charge").

should not cause the utility's return on equity or operating margin for the year to fall below the return on equity or operating margin most recently approved by the Commission." KIU Comments, Jan. 24, 2018. p. 2. On March 13, 2018, KIU reiterated "any calculation of the Act's impact should be viewed within a totality of all circumstances". KIU Comments, March 13, 2018. KIU committed to provide the Commission a report on the effects of the TCJA on the company by May 31, 2018 the ORS's recommended deadline. *See* KIU Comments, March 13, 2018 and ORS Comments, March 30, 2018. KIU never agreed to assign funds to a deferral account so they could be earmarked for a future refund.

### **3. The ORS's requested relief is unconstitutional.**

The ORS is asking the Commission to consider the benefits of the TCJA in isolation, but substantive due process requires the Commission to consider the regulated utility's overall earnings and whether it has the opportunity to earn its authorized rate of return or operating margin. S. Bell Tel. & Tel. Co. v. Pub. Serv. Com., 270 S.C. 590, 598 (1978) ("Before the Commission reaches a decision it must weigh the testimony and all other evidence"). KIU's tax liability is not a pass-through charge that can be adjusted as rates rise or fall. It was considered an operating expense in the company's last rate case when the Commission established its revenue requirement in an amount designed to give KIU the opportunity to earn its authorized operating margin. *See* Order 2017-277, Ex. 1, p. 17; Docket 2016-222-WS. It would be inappropriate for the Commission to now lower rates without considering *all* factors related to the company's financial condition. S.C. Elec. & Gas Co. v. Pub. Serv. Com., 275 S.C. 487, 491, 272 S.E.2d 793, 795 (1980) ("the proper approach for the Commission is to consider these extraordinary monies in setting the test period operating experience when a future rate increase is requested"). This method falls within the parameters of the Commission's ratemaking authority; the ordering of a general refund does

not. *Id.* If, as a result of these actions the utility is denied the opportunity to earn its authorized rate of return or operating margin, the Commission's actions would amount to a confiscatory taking of private property. S. Bell Tel. & Tel. Co. v. Pub. Serv. Com., 270 S.C. at 594 (1978) *citing* Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679 (1923), and Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944).

In Bluefield, the United States Supreme Court was clear that the due process clause of the Fourteenth Amendment requires a commission to consider all relevant factors when setting just and reasonable rates:

It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential."

Bluefield at 691, (1923) *citing* 'Mo. *ex rel.* Sw. Bell Tel. Co. v. Pub. Serv. Com.', 262 U.S. 276, 287 (1923)

For the Commission to order a rate reduction based on the effects of the TCJA in isolation, would contravene this established principle and violate the due process rights of the subjected utilities.

#### **4. The ORS asks the Commission to engage in impermissible retroactive ratemaking.**

By requesting the Commission to order refunds, the ORS is asking the Commission to engage in retroactive ratemaking. The South Carolina Supreme Court has ruled that, except in narrowly defined statutory circumstances, the Commission's ratemaking powers are prospective only. In S.C. Elec. & Gas Co. v. Pub. Serv. Com., the Commission ordered the utility to refund over seven million dollars to its customers as a result net profits from the interchange of power during the first six months of 1976 and 1977. S.C. Elec. & Gas Co. v. Pub. Serv. Com., at 488. The Supreme Court reversed, holding that the refund order constituted unlawful retroactive

ratemaking. The Supreme Court held that the Commission did not have the authority to order the refunds:

Our legislature has empowered the Commission to prescribe refunds in only two specific instances. Pursuant to Code § 58-27-880, it may order a refund for the difference between new rates under bond and those ultimately found to be just and reasonable by the Commission. Additionally, the Commission may order a reparation for a past charge in excess of the applicable rate under Code § 58-27-960. Neither of those situations is present here.

The result reached here may initially appear unjust to the retail customer and unduly generous to SCE&G. This is not the case. The crux of this issue is the firm principle that rate-making is prospective rather than retroactive. The Commission has no more authority to require a refund of monies collected under a lawful rate than it would have to determine that the rate previously fixed and approved was unreasonably low, and that the customers would thus pay the difference to the utility.

*Id.* at 490.

The SCE&G case is directly applicable to the present circumstances. Furthermore, the effects of the TCJA do not qualify for the exception to the rule against retroactive ratemaking allowing certain adjustments for extraordinary expenses. The Supreme Court has defined an “extraordinary expense” as “one that is unanticipated and non-recurring”. Porter, 328 S.C. at 231. Even if unanticipated, the TCJA’s effects are certainly recurring. The Commission does not have the authority to adjust rates based on the reduction of a single item of expense, even if unexpected, without establishing the total cost of providing service.

*[continued on next page]*

## CONCLUSION

The Commission should deny the ORS's motion and allow the utilities in this docket to report the effects of the TCJA on their revenues before considering whether it is necessary to establish a contested docket.

Respectfully submitted

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